C.A.L.L.

City Attorney Law Letter

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In This Issue:

City Attorney Law Letter
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Lauck v. State

TITLE: Arkansas Court of Appeals Holds Evidence Discovered During Consent Search of Car Was Properly Admitted

FACTS TAKEN FROM THE CASE

At around 12:55 a.m. on November 1, 2016, Saline County deputy sheriff Justin Oliver stopped Angelia Lauck on Interstate 30 after he witnessed her vehicle cross the center line for six seconds. Lauck was the only person in the car. Deputy Oliver asked for and was provided Lauck's license, registration, and insurance. Deputy Oliver testified that Lauck appeared disoriented and that something wasn't right. Lauck explained that she was sleepy, denied having anything to drink, and checked .00 on a PBT. Deputy Oliver testified that he remained concerned about Lauck's disorientation. Lauck did not show any clues on her HGN test, but she told Deputy Oliver that she had taken the muscle relaxer Soma. Deputy Oliver asked Lauck for consent to search her vehicle, and she said yes. When asking for consent to search, Deputy Oliver still had possession of Lauck's license, registration, and proof of insurance, and he had not written her a ticket. The search of Lauck's vehicle lasted two to three minutes. During the course of the search, Deputy Oliver found methamphetamine in Lauck's purse. Deputy Oliver testified that only ten to twelve minutes elapsed between the time he pulled Lauck over and the time he arrested her. Lauck was later convicted of possession of methamphetamine and possession of drug paraphernalia.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal to the Arkansas Court of Appeals, Lauck claimed that Deputy Oliver violated Arkansas Rule of Criminal Procedure 3.1 by detaining her longer than fifteen minutes, that the legitimate purpose of the traffic stop was over, and that the evidence therefore should have been suppressed. The Arkansas Court of Appeals quoted Ark. Rule of Crim. Proc. 3.1 in its entirety. The Court said that the Arkansas Supreme Court has stated that a police officer, as part of a valid traffic stop, may detain a traffic offender while completing certain routine tasks, such as computerized checks of the car's registration and the driver's license and criminal history, and the writing up of a citation or warning. The Court said that during this process, the officer may ask the motorist routine questions, such as his destination, the purpose of his trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered. After those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable.

The Arkansas Court of Appeals held that the trial court did not clearly err in denying Lauck's motion to suppress, and therefore the evidence was properly admitted. The Court said that the legitimate purpose of the traffic stop did not end when Oliver asked Lauck for consent to search her car. Oliver had not returned Lauck's license and paperwork, nor had he issued her a warning ticket or citation for her traffic violation. The Court noted that it was during that time that Oliver asked Lauck a routine question (could he search her car), which is permitted. In sum, the Court stated that Oliver had not completed the traffic stop prior to asking Lauck for consent to search; Lauck granted Oliver consent to search; only ten to twelve minutes passed between the

time Lauck was stopped, consented to the search, the drugs were found, and Lauck was arrested. For the above reasons, Lauck's motion to suppress evidence was properly denied.

Case: This case was decided by the Arkansas Court of Appeals on February 26, 2020, and was an appeal from the Saline County Circuit Court. The case citation is Lauck v. State, 2020 Ark. App. 145.

Review by Senior Deputy City Attorney Taylor Samples

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U.S. v. Oliver

TITLE: 8th U.S. Circuit Court of Appeals Upholds Search of Vehicle and Hotel Room Based on Confidential Informant

FACTS TAKEN FROM THE CASE

On November 25, 2014, police received information from a "confidential reliable informant" that Houston Oliver and his co-conspirators, Desmond Williams and Jimmy Green, would be mailing packages of cocaine to Minnesota from Maricopa, Arizona. As a result of this information, police contacted a postal inspector who found two packages in the Minnesota post office sent from Arizona – one from Maricopa, Arizona, and another with similar handwriting from Chandler, Arizona. After obtaining a search warrant, police officers opened the packages and found cocaine inside each package.

After the seizure of the packages, the informant told police that Oliver would be transporting cocaine in a BMW that would arrive in Minneapolis on November 30, 2014. On that date, police officers in Minneapolis stopped and impounded a BMW that belonged to Oliver and was being driven by Sharrod Rowe. A few days later, after obtaining a warrant, police searched the vehicle and discovered six kilograms of cocaine in the trunk. That same day, police obtained and executed a number of warrants to search locations associated with Oliver, including a hotel room he rented. During the search of the hotel room, police recovered certain personal items, including cell phones. Oliver was later convicted for conspiracy to distribute five kilograms or more of a mixture and substance containing a detectible amount of cocaine

ARGUMENT, APPLICABLE LAW, AND DECISION BY THE 8TH U.S. CIRCUIT COURT OF APPEALS

On appeal to the Eighth U.S. Circuit Court of Appeals, Oliver challenged a number of the trial court's pretrial rulings, including those associated with the search of Oliver's BMW and his hotel room.

Regarding his BMW, Oliver claimed that its search was unlawful because police had no warrant or probable cause at the time of the vehicle's stop. The Eighth Circuit agreed with the trial court that there was probable cause to search the vehicle, and therefore the search was lawful under the automobile exception to the warrant requirement. The Court stated that when probable cause exists to believe that contraband is located inside the vehicle, a police officer may search the passenger compartment and trunk under what is known as the automobile exception. The Court said that when the basis for the search is information supplied by an informant, such information may establish probable cause where the informant has a track record of providing accurate information or where the informant has accurately predicted certain events. The Court noted that in this case, the confidential informant relied on by police had already provided accurate information about the shipments of cocaine that were sent on November 24, 2014.

Also, the informant's tip that a BMW belonging to Oliver and transporting cocaine would arrive in Minneapolis on November 30th was corroborated when the BMW registered to Oliver arrived in Minneapolis on the predicted date. That Court said that this demonstrated that the informant had a track record of providing accurate information and correctly predicting certain events. Therefore, the information furnished by the informant provided probable cause to search the BMW under the automobile exception.

Next, the Court addressed Oliver's claim that there was no probable cause to search his hotel room, and the warrant did not allow for the seizure of cell phones. The Eighth Circuit disagreed with Oliver and upheld the search of the hotel room and the seizure of the cell phones. Oliver claimed that the lack of information in the affidavit regarding the confidential informant's basis of knowledge of Oliver's drug trafficking undermined probable cause. The Court stated that when an affidavit is based on information from an informant, the informant's reliability, veracity, and basis of knowledge are relevant to whether the affidavit provided probable cause to support the search. But an informant's reliability and basis of knowledge are not entirely separate and independent requirements to be rigidly exacted in every case. An informant's track record of providing trustworthy information establishes reliability. The Court concluded that the affidavit here described the information provided by the confidential informant, the informant's track record of reliability, and the investigative efforts to corroborate the informant's information, including the interception of the packages of cocaine mailed from Arizona to Minneapolis and of the BMW transporting cocaine. Given the evidence of the confidential informant's reliability, the Court held that the district court did not err in finding that the affidavit's failure to set forth the informant's basis of knowledge was not a fatal flaw, and there was probable cause to support a search.

Lastly, the Court concluded that the warrant's reference to "other media" as items to be seized is broad enough to include cell phones. The Court said that the warrant authorized the seizure of "other media that show standing for an address, vehicle, the location of narcotics proceeds, or a connection between people, addresses and vehicles or that a crime has been committed." The Court agreed with the trial court that it is self-evident that a cell phone could constitute such media, and the Court pointed-out that it had held that cell phones may be seized when they may contain other items listed in a search warrant. And even if the Court credited Oliver's argument that cell phones do not constitute media, the Court said the cell phones here could have contained other items specifically mentioned in the warrant, such as notes or photographs. Therefore, the trial court did not err in concluding that the police's seizure of Oliver's cell phones did not violation the Fourth Amendment.

Oliver's conviction was affirmed.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on February 19, 2020, and was an appeal from the United States District Court for the District of Minnesota – St. Paul. The case name is U.S. v. Oliver.

Review by Senior Deputy City Attorney Taylor Samples

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Search and Seizure – Plain View Seizure

US v. Williams

No. 18-2617, 938 F.3d 966 (8th Cir. 2019)

United States Court of Appeals for the Eighth Circuit

September 12, 2019

Police responded to a burglary at a drug house. In so doing, they encountered the tools and product of the trade and additionally discovered a surveillance system that would yield evidence of the crime for which they had been summoned and an inside glimpse of a drug manufacturing operation.

Facts.

> On June 16, 2015, St. Louis Metropolitan Police officers responded to a 911 emergency call reporting a burglary at 4118 Shreve Avenue. While a home security siren sounded, law enforcement approached the front door with guns drawn. The officers observed broken windows on the main and storm doors. There was blood on the porch floor and on a window shade stuck through the broken glass. The door had footprints on it and was ajar. Rather than forcing the door further, an officer reached through the broken window, unlocked the deadbolt, and opened the door.
>
> Police entered the home and began a protective sweep to look for intruders or victims. The bedroom on the main floor had been ransacked: the bed was overturned, a dresser blocked a door, and items (including a firearm) were strewn all over the floor. As they attempted to reach the blocked door, officers stepped on loose papers, suspected drugs, and drug paraphernalia. Officers saw more drugs, scales, test tubes, pills, rubber bands, baggies, and another firearm when they moved the dresser to unblock the door. In the basement, an officer seized a bag with white powder visibly hanging out of a hole in the wall.
>
> During the protective [*3] sweep, the officers also saw a Night Owl DVR System (Security DVR) near the television in the living room. There were wires running from the Security DVR to video cameras installed on the interior and exterior of the home, including one aimed at the front door. Finding no one in the house, the officers contacted detectives to join them at the scene. Officers collected and seized the drugs, firearms, and paraphernalia they found plus a cell phone and documents showing Williams's name and address. The detectives also unplugged and seized the Security DVR.

> Three days later, investigators obtained a warrant to search the contents of the cell phone, the Security DVR, and a safety deposit box listed on the documents seized from the house. The Security DVR was kept in a sealed bag in an officer's locker until it was given to the Cyber Crimes Unit. A search of the Security DVR revealed more than 41,000 video clips recorded over three months, including some of Williams carrying a firearm and buying, bagging, cutting, weighing, and selling narcotics inside the house.
>
> Although the Security DVR showed the suspected burglars stepping up to the front door, it did not show them inside the house. Also, [*4] footage shows that police went beyond the scope of a protective sweep by opening kitchen cabinets and a microwave. They also turned on the television and waved at the security camera in the living room.
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> United States v. Williams, No. 18-1445, 2020 U.S. App. LEXIS 5965, at *2-4 (8th Cir. Feb. 27, 2020)

Law.

"Where the initial intrusion that brings the police within plain view of [] an article is supported, not by a warrant, but by one of the recognized exceptions to the [*5] warrant requirement, the seizure is also legitimate." ... This is true even if "a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." United States v. Williams, at *4-5 (internal cites omitted).

"During a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is 'immediately apparent.'". United States v. Williams, at *5 (quoting United States v. Green, 560 F.3d 853, 856 (8th Cir. 2009)).

"[P]olice may seize any evidence that is in plain view during the course of their legitimate emergency activities." Id at *6.

Analysis.

The protective sweep being performed was more extensive than if they were there merely to apprehend a suspect on a warrant or for some other limited purpose. Officers were responding to a home intrusion and had to clear the entire house. This protective sweep would thus allow them into each room to ensure the burglar or burglars were not still on the premises. All parties agreed that the initial intrusion was lawful.

The Defendant was arguing that, because this was a home and they had no warrant, the officers had to promptly leave once the "exigency had dissipated" and leave the evidence behind once they had cleared the building. Obviously, the Court did not agree with that interpretation.

The elements of a "plain view" search are: 1) Police must lawfully be in a position to observe the contraband, 2) It must be "inadvertently" discovered, and 3) The incriminating nature of the contraband must be readily discernable.

Arkansas law is the same as federal law in regard to plain view searches. Johnson v. State, 291 Ark. 260; 724 S.W.2d 160; 1987, summarizes Arkansas plain view search law.

> Following [***4] an informant's tip that marijuana was being grown on the ten acres surrounding the Johnsons' residence, the police planned a helicopter inspection of the property. Prior to the arrival of the helicopter, two law enforcement officers were driving by the property on a public road and spotted Raphael Johnson carrying seven stalks of marijuana cradled in his arms. The officers said they were driving 15 to 20 miles per hour and that Raphael was only 25 to 30 feet away. Raphael began walking faster toward a barn after he realized he had been seen. The officers then drove onto the property, followed Raphael on foot through the barn, and arrested him, now empty-handed, about 50 yards behind the barn.
>
> After Raphael was arrested, the officers heard a tractor start up and turned to see Raphael's son, Robert Johnson, 50 to 75 yards away, mowing down what looked like marijuana plants. Robert was also arrested.
>
> Johnson v. State, at *4.

The Arkansas Supreme Court held in that case that the officers could lawfully be on a public highway and they were trained in marijuana detection, thus satisfying the first and third elements. As to the element of "inadvertence," the Court reasoned "[r]egardless of why the police were driving by the property, however, no intrusion at all had occurred before the marijuana was first seen. To hold that police cannot seize marijuana that is in plain view from the highway and later after they have made unquestionably valid arrests would place too much emphasis on the inadvertence requirement."

The Arkansas Court in Johnson went on to more specifically define "inadvertence." "The inadvertence requirement has generally been interpreted to mean that "immediately prior to the discovery, the police lacked sufficient [***8] information to establish probable cause to obtain a warrant to search for the object."" Id at *7, 8.

William's conviction was affirmed.

Review by David Dero Phillips.

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Civil Rights – First Amendment Retaliation

Henry v. Johnson

2020 U.S. App. LEXIS 5158 *; __ F.3d __; 2020 WL 827164

United States Court of Appeals for the Eighth Circuit

February 20, 2020

An officer was terminated after posting a series of allegations of prosecutorial misconduct and organizational corruption. The terminated officer sued for retaliation on protected speech.

Facts.

This suit arises out of the May 2014 drowning of twenty-year-old Brandon Ellingson while he was in MSHP custody on the Lake of the Ozarks. Ellingson's death resulted in a series of civil and criminal cases and internal MSHP investigations of the drowning. While these investigations were occurring, MSHP Sergeant Randy Henry spoke out several times about MSHP's role in the drowning.

In October 2014, Henry testified twice before a special committee of the Missouri legislature organized to look into a 2011 merger of the Missouri Highway Patrol with the Missouri Water Patrol — the combined entity now known as MSHP. Henry first testified in his official capacity as an MSHP member, and later testified in plain clothes as a private citizen. In June 2015, Henry also gave deposition testimony for a civil lawsuit concerning the Ellingson case. These instances make up what will be referred to as Henry's "testimonial speech."

Henry also spoke numerous times to a member of the press and members of the Ellingson family about [*3] what he claimed was an internal MSHP cover-up of the drowning. Henry also raised the possibility of internal MSHP corruption during the investigation of the Ellingson drowning by insinuating the special prosecutor in the case may have been involved in a quid pro quo with MSHP to exonerate her son in a rape investigation. Henry posted this allegation on a Facebook page dedicated to Ellingson. The social media post outlined how the son was cleared of the rape allegation after a DNA analysis was undertaken by MSHP, and suggested the special prosecutor had a conflict of interest because of this DNA test.

The special prosecutor interviewed Henry as a part of her MSHP investigation and during the interview he admitted to spreading information about her son. After her interview with Henry, she recused herself from the Ellingson

investigation. This caused both a prolonged delay in the investigation and increased costs.

In February 2015, Henry was ordered to attend a mandatory counseling evaluation through the Employee Assistance Program ("EAP"). The mandatory counseling evaluation arose after at least two individuals expressed concern about how Henry was coping with the Ellingson matter.

In March [*4] 2015, the special prosecutor filed a complaint against Henry which was investigated by Appellee Corey Schoeneberg. Schoeneberg determined Henry had violated three MSHP General Orders, which led to two prosecutors asserting they would no longer prosecute charges brought by Henry due to concerns about his trustworthiness and integrity.

In June 2015, Henry's direct commander submitted a Betterment of the Patrol Transfer Request for Henry to be transferred out of Troop F. This request was approved by Appellee J. Bret Johnson, who was the superintendent at the time. Formal charges and an offer of discipline were served on Henry later that month. This offer of discipline was a reduction in rank from sergeant to corporal. Henry rejected this offer, pursued an appeal, requested three continuances, and then retired before a hearing could take place.

A later investigation of MSHP by a second special prosecutor regarding the Ellingson drowning concluded Henry's allegations of MSHP misconduct were unsubstantiated.

Henry v. Johnson, No. 18-3298, 2020 U.S. App. LEXIS 5158, at *2-4 (8th Cir. Feb. 20, 2020)

Law.

In determining if a constitutional violation has taken place, the Court performs analysis under a series of cases which indicate whether the alleged victim engaged in protected activity that lead to an adverse employment action and that the protected speech was a motivating factor. Id at 6. As part of the balancing test, the interests of both the individual and the government are weighed.

Analysis.

Both parties agreed that testimony before a legislative body is protected activity. They also agreed that termination was an adverse employment action. So the Court reviewed the non-testimonial speech, mainly Facebook and other internet posts and contact with news media and the victim's family, to determine if that speech was protected.

All parties also agree that the integrity of the MSHP and judicial system were matters of public concern. However, in examining the context of this matter of public concern, the Court acknowledged that "[l]aw enforcement [*10] agencies, more than other public employers, have special organizational needs that permit greater restrictions on employee speech." Henry v. Johnson, at *9, 10. Whereas the discharged officer had no valid interest in spreading lies and disharmony. The result of Henry's public proclamations was to alienate him from necessary interoperation within his department and with other agencies necessary to criminal prosecution.

The Court held that all non-testimonial speech was unprotected. No constitutional violation took place when the disgraced officer was fired. Qualified immunity was granted to the Defendants.

Review by David Dero Phillips.

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Civil Rights – Whistle Blower Retaliation

Nagel v. City of Jamestown

No. 18-2842, 2020 U.S. App. LEXIS 7216

United States Court of Appeals for the Eighth Circuit

March 9, 2020

A city officer was terminated after an accusation of wrongful appropriation was made against the County Sheriff. The accusation proved false and the officer was found to have lied during the investigation. The officer sued for retaliation after he was fired.

Facts.

> In late October 2015, station KVLY's "Whistleblower Hotline" received a packet of documents accusing a member of the Sheriff's Department of using a County-owned jet ski for personal use. The packet included a printed screenshot of Deputy Sheriff Matt Thom riding a jet ski with Sheriff Chad Kaiser's son. KVLY identified the screenshot as Thom's Facebook profile picture. The Facebook account that printed Thom's photo was connected by KVLY reporter Christine Stanwood to a Facebook profile named "Dominic."
>
> On November 4, Stanwood took the whistleblower packet to the Stutsman County courthouse to investigate. She learned that morning that Stutsman County did not own a jet ski and that Dominic Brimm was a Facebook [*3] alias for Nagel. Stanwood then met with Nagel in the building lobby and showed him portions of the packet. Nagel confirmed he was Dominic Brimm on Facebook, an account he used for police investigating. He identified the screenshot as a picture of Thom on a jet ski but denied sending the packet to the Whistleblower Hotline. He consented to be interviewed by Stanwood outside the building to "clear his name" but said: "I can't talk to you as a police officer. I said, I will only talk to you either as Thomas Nagel or as [president of] the North Dakota Fraternal Order of Police." During the interview, Nagel wore civilian clothes and removed his badge.
>
> After the interview, Nagel discussed it with Chief Edinger in his office and then left the courthouse to meet with his attorney, Joseph Larson. In one or both of those meetings, Nagel learned that Stutsman County did not own a jet ski. KVLY aired the story on "Valley News Live" that evening. Entitled "Fraud and Feud at Stutsman County Sheriff's Office," the newsclip began by recounting that KVLY received a tip from "someone named Dominic" alleging the Sheriff's Department was using government property for personal use. After explaining the [*4] allegation was false, the news clip noted a "political dogfight between two of the

top cops in Stutsman County." "I am very upset," Sheriff Kaiser said in the news clip.

Stanwood's narration then explained that the Facebook profile attached to the packet, Dominic Brimm, was an alias for JPD detective Tom Nagel, "who also happens to be the President of the Fraternal Order of Police" (hereafter, "FOP"). The news clip included images of JPD vehicles and excerpts of Nagel's interview with Stanwood in which he confirmed that Dominic Brimm was his alias but denied sending KVLY the packet: "I was aware of the photograph and what was in it, but I didn't mail it." The transcript of the news clip continues:

Then asked: If it wasn't you, then who? [County Auditor Casey] Bradley tells me that the relationship has been strained in the past between Nagel and Kaiser.

"I can say it's somebody that would be in fear of losing their job," says Nagel.

There was immediate, strong reaction to the KVLY news clip at the Stutsman County courthouse, which houses both the JPD and the Sheriff's Department. On the following day, Sheriff Kaiser asked Edinger to keep Nagel out of the Sheriff's Department -- which is separated [*5] from the JPD by a hallway -- so he could manage the "chaos" in his department. County Auditor Bradley told Edinger that one or more County Commissioners called for Nagel's resignation. The County banned Nagel from its offices and revoked FOP contracts to operate ATMs and vending machines in the County portion of the courthouse. Morale in both law enforcement agencies suffered. JPD officers lamented the loss of trust between the departments; one apologized to a member of the Sheriff's Department on behalf of the JPD. Members of both departments "shunned" Nagel. Edinger reported that some 150 citizens approached him in public to complain that a police officer would "irresponsibly accuse someone of a crime so easily investigated and debunked."

On November 10, Chief Edinger, Sheriff Kaiser, and the County Attorney asked the North Dakota Bureau of Criminal Investigations ("BCI") "to conduct an investigation of the jet ski incident for potential crimes and policy violations." BCI assigned Special Agent Maixner to investigate. His November 12 Report stated that County Auditor Bradley persuaded reporter Stanwood and her supervisor (by speaker phone) that Stutsman County did not own a jet ski [*6] by providing a listing of Stutsman County assets and insurance coverages. The Report identified Nagel as the "Subject" of the "Stutsman County Defamation" investigation.

...

In early February 2016, ... the county attorney assigned to decide the issue concluded there was insufficient evidence to support a prosecution for criminal defamation.

...

In late February, Johnson and Falk submitted reports summarizing their findings and conclusions from the internal investigation. Major Johnson concluded that Nagel's statements in the KVLY interview would not "lea[d] the public to believe that he was clearing his name," and his appearance "brought discredit to himself but also [the JPD and the Sheriff's Department]." Major Falk noted that four individuals [*8] interviewed recalled Nagel telling them he knew who sent the packet. Falk concluded, "It is extremely difficult not to believe that Detective Nagel is protecting the identity of whoever is responsible for the false allegation." After reviewing these reports, Edinger convened a Review Board of four officers and one citizen to determine if JPD officers had violated JPD policies "surrounding or related to the Whistle Blower broadcast of November 4th, 2015." After reviewing the reports from the criminal and internal investigations and the JPD Rules and Regulations and Code of Ethics, the Review Board unanimously recommended Nagel be terminated.

In a March 7, 2016 letter to City Administrator Jeffrey Fuchs, Edinger agreed with the Review Board and recommended Nagel's termination. "The review board determined Sgt. Nagel violated 19 policies," Edinger noted. He opined that Nagel violated the Peace Officer's Code of Conduct by being aware of alleged felony misuse of government property and not reporting it. He noted several witnesses heard Nagel talk about knowledge of the incident, contradicting his internal interview, which "likely makes him a 'Giglio impaired law enforcement officer.'" In [*9] addition, Edinger opined, "Sgt. Nagel eroded public trust in local law enforcement to a severe degree," making him "no longer a viable law enforcement officer."

In a letter to Nagel dated March 9, 2016, Fuchs and Jamestown Mayor Katie Anderson concurred in the recommendations of the Review Board and Edinger and terminated Nagel's employment for violations of the Law Enforcement Code of Ethics and JPD Rules and Regulations. Nagel promptly appealed to the Jamestown Civil Service Commission, which conducted an eight hour post-termination hearing on April 27. Nagel, represented by counsel, submitted 121 exhibits, called seven witnesses including five experts, made an opening

statement, examined and cross-examined witnesses, and submitted a one-hundred-page closing brief. On May 20, the Commission affirmed Nagel's dismissal.

Nagel v. City of Jamestown, No. 18-2842, 2020 U.S. App. LEXIS 7216, at *2-9 (8th Cir. Mar. 9, 2020)

Law.

"[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Nagel v. City of Jamestown, No. 18-2842, 2020 U.S. App. LEXIS 7216, at *9 (8th Cir. Mar. 9, 2020) (quoting Garcetti v. Ceballos, 547 U.S. 410, 417, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)).

Under Garcetti there were two inquiries to determine whether public employee speech is protected against employer retaliation:

> The first requires determining whether the employee spoke as a citizen [*10] on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

547 U.S. at 418 (citations omitted).

"The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." Lane v. Franks, 573 U.S. 228, 134 S. Ct. 2369, 2379, 189 L. Ed. 2d 312 (2014). "Under Garcetti, when a public employee speaks on a matter of public concern pursuant to his official duties, the speech is unprotected against employer retaliation." Lyons v. Vaught, 875 F.3d 1168, 1173 (8th Cir. 2017).

Analysis.

Former detective Nagel was quickly exposed to be a liar. That always starts the case out on the wrong foot. Nagel alleged that he was not given a fair hearing prior to termination. The Court held that his rights in his employment were adequately protected by both notification and a post-adjudication hearing. But our focus for discussion was Nagel's claim that he was wrongly terminated in retaliation for statements he made pursuant to his First Amendment rights.

As observed in Garcetti and Lane, statements made dealing with a public employee's official duties can be regulated by the employer. This goes back to agency theory. An agent is

operating under the control of and with the authority of the principal. The same applies to government employees.

In this case, Nagel was identified in the article as a Jamestown Police Officer and was wearing a gun and handcuffs. The subject matter, a violation of the state criminal code, was within Nagel's defined duties of investigation. "[W]hen a government employee answers a reporter's questions involving matters relating to his employment, there will be circumstances in which the employee's answers will take on the character of '[o]fficial communications,' and thus will not be entitled to First Amendment protections." Nagel v. City of Jamestown, at *11.

Nagle's speech was found to be in violation of departmental policy. The falsity of his statements created far reaching obstacles to inter-departmental cooperation and had a detrimental effect on the other officers of his department.

One other issue mentioned in this case was that Nagel was referred to as "Giglio-impaired. That was a reference to Giglio v. United States, 405 U.S. 150 (1972). That case stands for the proposition that all evidence regarding credibility of a witness must be disclosed to the Defense in a criminal trial. The implication is that once a law enforcement officer has the taint of corruption, that taint follows the officer forever. All future cases would be compromised.

Order granting Qualified Immunity to Defendants was affirmed.

Review by David Dero Phillips.

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Civil Rights – False Arrest

Chestnut v. Wallace

947 F.3d 1085

United States Court of Appeals for the Eighth Circuit

January 21, 2020

A jogger stops to observe two traffic stops by the same officer. The officer calls for the jogger to be confronted. The jogger is questioned, frisked and put in handcuffs. A lawsuit follows.

Facts.

> According to plaintiff Kevin Chestnut, one evening around dusk he paused his jog in a St. Louis park to watch St. Louis Metropolitan Police Department Officer Leviya Graham perform a traffic stop. He watched the stop for five or ten minutes and then resumed his [**2] jog. Shortly thereafter, Chestnut stopped again to observe Graham perform another traffic stop. During this stop, Chestnut stood in a grassy area between the jogging trail and the sidewalk and leaned against a tree. He testified that he stood thirty to forty feet away and across the street from where Graham was conducting the stop. He asserts that he was watching the stops out of curiosity since there had "been a lot of difficulty in citizen/police interaction" as of late. The parties point out that this specific park had been the site of testy exchanges between police and citizens.
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> Chestnut caught Graham's attention. She radioed dispatch for assistance, reporting that a suspicious person had been following her to her car stops. She described Chestnut as a white male in a yellow shirt who was leaning against a tree across the street from her. Officer Dawain Wallace responded to the call and arrived on scene. From his police car, he saw someone matching Chestnut's description and shined his spotlight on him. Wallace testified at one point that either Graham or the dispatcher had said that Chestnut was "hiding in the treeline" and "kind of peeking and lurking around a tree." Chestnut, [**3] on the other hand, testified that he purposely stood in a location where the headlights on Graham's car illuminated him. He said that he intentionally made himself plainly visible, that he was standing still, and that he was not interfering.
>
> After shining his spotlight, Wallace got out of his car, approached Chestnut, and asked him for some form of identification. Chestnut had none on him, so Wallace asked him for his name, address, and social security number. Wallace maintains that he requested this information so he could determine whether Chestnut had

> any outstanding warrants. Chestnut provided his name and, he says, his birthday. But he agreed to provide only the last four digits of his social security number. At that point, Wallace frisked Chestnut for weapons but found none, yet he directed other officers who had arrived on scene to put Chestnut in handcuffs. Chestnut then provided his full social security number to Wallace and asked to speak to one of Wallace's supervisors. Wallace used the information to perform a warrants check, [*1088] and he learned that Chestnut had no outstanding warrants. After Wallace's supervisor arrived and spoke with Chestnut, he directed that the handcuffs [**4] be removed and permitted Chestnut to leave. Chestnut estimated that the entire encounter with Wallace lasted twenty minutes.
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> Chestnut v. Wallace, 947 F.3d 1085, 1087-88 (8th Cir. 2020)

Law.

The public has a "clearly established right to watch police-citizen interactions at a distance and without interfering." Id at 1090. "[I]n a democracy, public officials have no general privilege to avoid publicity and embarrassment by preventing public scrutiny of their actions." Id.

In Arkansas, "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." Stufflebeam v. Harris, 521 F.3d 884; 2008 U.S. App. LEXIS 7156.

Analysis.

As with many of these cases, the facts are not agreed upon by the parties. For the limited purpose of ruling on a motion to dismiss due to qualified immunity, the Court must make factual determinations. Where the versions of the facts differ, the Court must use the version most favorable to the non-moving part, which would be the plaintiff.

The Court was very direct in establishing that the public may observe and even record police operations performed in public view. This acknowledgement sets the tone for analyzing the correctness of placing a person in handcuffs who has committed no violation. Even the stop and frisk was held to be inappropriate, given the circumstances.

The Court acknowledged that "whether an officer has reason to investigate an on-looker is a "complex" question because "some on-lookers may create safety hazards, while others may seek to frustrate valid law enforcement."" Chestnut at 1095. So this case does not create a "bright line rule" that on-lookers may not be approached. However, any demand or intrusion, when made without connection to suspected articulable criminal activity, is excessive, even the demand for identification.

Arkansas law for detention and arrest is the same. In Stufflebeam v. Harris, an Arkansas law enforcement officer stopped a vehicle for displaying no license plate, a routine traffic violation. Stufflebeam was a passenger and he refused to identify himself on demand. Stufflebeam was arrested for obstruction. The US Court of Appeals for the Eighth Circuit described the situation as one in which "no reasonable police officer could believe he had probable cause to arrest this stubborn and irritating, but law abiding citizen." Stufflebeam v. Harris at **10. Qualified immunity was denied to the officer in that civil rights law suit as it was in Chestnut v. Wallace.

Review by David Dero Phillips.

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